RECENT CASES.

ALIEN—RIGHT TO SUE ALTHOUGH INTERNED—A German born resident, registered according to law as an alien enemy, entered into a contract with a native born resident, and was shortly afterwards interned. *Held:* He may sue for a breach of contract as such restraint *per se* does not make him an alien *ex lege*. Shaffhims v. Goldberg, 113 L. T. 949 (Eng. 1915).

Whether an alien can sue or not depends upon his residence and business domicile and not upon his nationality. *Re* Mary Duchess of Sutherland, 31 Times L. Rep. 394 (Eng. 1915); Wolf & Son v. Carr, Parker & Co., Ltd., 139 L. T. Jour. 24 (Eng. 1915). Before an alien enemy resident can sue, in war time, he must show that he is in the country by license of the sovereign. Princess of Thurn and Taxis v. Moffitt, 112 L. T. Rep. 114 (Eng. 1915). But registration as an alien enemy, as required by law, is sufficient evidence of such license. Porter v. Freudenberg, 112 L. T. Rep. 313 (Eng. 1915). A prisoner of war is likewise under the protection of the sovereign and is not *ex lege*. Sparenburgh v. Bannatyne, 1 Bost. & P. 163. (Eng. 1797). But an interned alien enemy has no right by means of a writ of *habeas corpus* to question the authority of the sovereign so to intern him. Rex v. Supt. of Vine Street Police Sta.; *ex parte* Liebmann, 113 L. T. Rep. 971 (Eng. 1915).

In the United States, the general rule is that an alien enemy cannot sue in our courts. Wilcox v. Henry, 1 U. S. 69 (1782); Mumford v. Mumford, Fed. Cas. No. 9918 (1812); Johnson v. Thirteen Bales, *etc.*, Fed. Cas. No. 7415 (1832). However, the right of action is only suspended during the continuance of the war. Jackson v. Decker, 11 Johns 418 (N. Y. 1814). But an alien enemy, resident here by license of the government, may maintain a personal action. Otteridge v. Thompson, Fed. Cas. No. 10,618 (1814); Parkinson v. Wentworth, 11 Mass. 26 (1814). And this license will be implied from the absence of an order to depart, even where the action is not personal. Clarke v. Morey, 10 Johns 69 (N. Y. 1813). But a resident citizen of one belligerent nation cannot maintain an action in the courts of the other. Bell v. Chapman, 10 Johns 183 (N. Y. 1813); Bishop v. Jones, 28 Tex. 294 (1866).

ATTORNEY AND CLIENT—COMPROMISE OF ACTION—AUTHORITY OF ATTORNEY—The attorney of one of a large number of creditors signed a composition agreement for 20 per cent. in ignorance of the fact that his client had given instructions not to settle for less than 100 per cent. *Held:* The creditor could recover the full amount of the claim from his debtor. Hamberger et al. v. White, 154 Pac. 576 (Okl. 1916).

The general rule is that an attorney has not, without authority from his client, the power to compromise a cause of action, either pending or to be instituted. Gray v. Howell, 205 Pa. 211 (1903); Miocene Ditch Co. v. Moore, 150 Fed. 483 (1907). An attorney certainly cannot bind his client

by any unauthorized act which amounts to a total or partial surrender of a substantial right. Pomeroy v. Prescott, 106 Me. 401 (1910). The general rule also prohibits an attorney from receiving, in the absence of authority from his client, a sum less than that actually due in satisfaction of his client's claim. Sonneborn v. Moore, 105 Ga. 497 (1898); Schreiber v. Straus, 147 Ill. App. 581 (1909). And this is especially so where it has been previously reduced to the form of a judgment or decree. Housenick v. Miller, 93 Pa. 514 (1880); Smith v. Jones, 47 Neb. 108 (1896). The principal case is in accord with the general rule that where the attorney has express directions from the client not to enter into a compromise, then, of course, the client is not bound by the arrangement. Fray v. Voules, 1 El. & E. 839 (Eng. 1859); Dalton v. West End R. Co., 159 Mass. 221 (1893). But an unauthorized compromise may, of course, be ratified. Beagles v. Robertson, 135 Mo. App. 306 (1908); Reid v. Dickinson, 37 Iowa 56 (1873).

BILLS AND NOTES—HOLDER IN DUE COURSE—NOTICE OF INFIRMITY IN INSTRUMENT—A bank purchased a negotiable note with no actual knowledge of a defence which did actually exist, but with knowledge of certain facts which would have put a prudent man on guard. *Held:* The bank was negligent in failing to make proper investigation and was not a holder in due course. Boxell v. Bright National Bank of Flora., 110 N. E. 982 (Ind. 1916).

While there are two views on this subject, the greater number of jurisdictions are now in accord that circumstances which would excite the suspicion of a prudent man are not sufficient to put the purchaser of a negotiable instrument on inquiry. Goodman v. Simonds, 20 Howard 367 (U. S. 1857); Bradwell v. Pryor, 221 Ill. 602 (1906). Therefore the principal case is *contra* to the general rule. It indorses the so-called "doctrine of Gill v. Cubitt," 3 Barn. & C. 466 (Eng. 1824). The latter case was soon reversed in England, being ruled against in Crook v. Jadis, 5 Barn & Ad. 909 (1834); and finally completely reversed by Goodman v. Harvey, 4 Ad. & Ell. 870 (Eng. 1836). This latter case held in accord with what is now the majority rule in America that there must exist bad faith to overthrow the title of a holder in due course. Custard v. Hodges, 155 Mich. 361 (1909); Rice v. Barrington, 70 A. 169 (N. J. 1908). Even gross negligence will not defeat one's title if it does not amount to bad faith. Goodman v. Harvey, *supra*. However, it has been held that the purchaser must not wilfully shut his eyes to the means of knowledge which he knows are at hand. Goodman v. Simonds, *supra*. The doctrine of the principal case is well established in Indiana. Schmueckle v. Waters, 125 Ind. 265 (1890); State Bank of Greentown v. Lawrence, 177 Ind. 515 (1912). Other states in accord with Gill v. Cubitt, *supra*, and the principal case, at common law are Vermont and New Hampshire. Pierson v. Huntington, 82 Vt. 132; Bank v. Ryder, 58 N. H. 512 (1879).

The majority rule has influenced in similar proportions the negotiable instruments statutes. A few states have incorporated in their acts the minority doctrine of Gill v. Cubitt. Rockford v. Barrett, 22 S. D. 83 (1908); Brick Co. v. Jackson, 59 S. E. 92 (1907). The statute passed recently in

Indiana has repudiated the minority view and the principal case would have been expressly decided the other way had not the institution of suit been prior to the passage of the act. See Indiana Acts, 1913, p. 129, Art. IV.

CONTRACTS—CONSIDERATION—PRE-EXISTING DEBT—One who obtained title to real estate by fraud conveyed it to a third person in discharge of a pre-existing debt. *Held:* The grantee was a "purchaser for value." Sutton v. Ford, 87 S. E. 799 (Ga. 1916).

It is now generally held that one who takes a transfer of a negotiable instrument in payment of or to secure an antecedent debt ranks as a purchaser of value. Bigelow Co. v. Automatic Gas Co., 107 N. Y. Supp. 894 (1907); Graham v. Smith, 155 Mich. 65 (1908); Swift v. Tyson, 16 Peters 1 (U. S. 1842). But there is a split of jurisdictions where property other than negotiable instruments is so transferred. The principal case is in accord with those cases, holding that a *bona fide* purchaser of property for an antecedent debt constitutes the vendee a purchaser for value. Schlister v. Harvey, 65 Cal. 158 (1884); Adams v. Vanderbeck, 148 Ind. 92 (1896); Harris v. Evans, 134 Ga. 161 (1909). *Contra,* Furman v. Rapelje, 67 Ill. App. 31 (1896); Ross v. Hodges, 157 S. W. 391 (Ark. 1913). Some decisions have drawn a distinction between one who takes a transfer of property as security for the payment of a pre-existing debt and one who takes an absolute conveyance in payment of the indebtedness due, holding the transferee to be a purchaser for value in the latter case, but not in the former. State Bank v. Frame, 112 Mo. 502 (1892).

CORPORATIONS—FAILURE TO RECORD CHARTER—RIGHT TO BRING SUIT—A corporation had failed to record its certificate of incorporation in the Recorder of Deed's office, as required by the Pennsylvania Act of April 29, 1874, P. L. 73, but had otherwise been duly organized and had assumed corporate powers. The company later came into the hands of a receiver. *Held:* The receiver could maintain a suit at law for a debt due to the company. *Schmitt, Receiver of the Interstate Lumber Company* v. *Potter Title & Trust Company,* 61 Pa. Super. Ct. 301 (1915).

It is difficult to define a *de facto* corporation, or to lay down all the elements essential to constitute one. In *Re* Gibbs, 157 Pa. 59 (1893), the court said: "It is an apparent corporate organization, asserted to be a corporation by its members, and actually acting as such, but lacking the creative *fiat* of the law." More complicated definitions are given by the courts of other jurisdictions. Methodist, *etc.,* Church v. Pickett, 19 N. Y. 482 (1859); Society Perun v. Cleveland, 43 Ohio St. 481 (1885); Allen v. Long, 80 Tex. 261 (1891); Hasselman v. United States Mortg. Co., 97 Ind. 365 (1885). What one court has considered to be an essential element of a corporation *de facto,* another court will entirely ignore, so that it is well nigh hopeless to attempt to harmonize all the judicial definitions. The court in the principal case considers three things as necessary to the existence of a corporation *de facto:* (1) a law under which it is alleged to have been created; (2) an attempt to organize under the law; and (3) an assumption and exercise of corporate powers under such attempted or-

ganization. The court apparently disregards *bona fides* as a necessary element, although the majority of decisions make good faith essential. Tulare Irr. Dist. v. Shepard, 185 U. S. 1 (1901), Johnston v. Okerstran, 70 Minn. 303 (1897); Jones v. Aspen Hardware Co., 21 Colo. 263 (1895). See Thompson: Corporations, 2nd Ed., Vol. 1, Sec. 239. Assuming that an association is a corporation *de facto*, it is universally held that its existence cannot be attacked collaterally. Commonwealth v. Monongahela Bridge Co., 216 Pa. 108 (1906); Georgia, *etc.*, Rwy. Co. v. Mercantile Trust, *etc.*, Co., 94 Ga. 306 (1893); Keyes v. Smith, 67 N. J. L. 190 (1901).

Aside from the question whether the plaintiff was or was not a corporation *de facto*, it has been decided that the appointment of a receiver to wind up the affairs of a corporation is conclusive of all prior matters involved in such appointment, so that the failure to record the certificate of incorporation could under no circumstances be inquired into at the instance of the defendant in the principal case. Capital, *etc.*, Insurance Co. v. Boggs, 172 Pa. 91 (1895); French v. Harding, 235 Pa. 79 (1912).

DEEDS—CONSTRUCTION—EXCEPTIONS AND RESERVATIONS—The owner of a large farm sold the property, *reserving* a family burying ground, containing about one-fourth of an acre, with the right of free ingress and egress. Subsequently the only bodies buried were removed with the consent of the grantees. *Held:* The burying ground did not belong absolutely to the grantor, but the grantor was merely entitled to use it for the specified purpose, and having abandoned, could not grant the land to third persons. Bradley v. Va. Ry. Co., 87 S. E. 721 (Va. 1916).

At common law the purpose and effect of an exception was to exclude from the operation of the conveyance some part of the property covered by the general words of description, it being always something actually existent. Co. Litt. 21a; Sheppard's Touchstone, 77 *et seq.;* Washington Mfg. Co. v. Comm. Fire Ins. Co., 13 Fed. 646 (1882). A reservation on the other hand was a clause by which the grantor reserved to himself some new thing issuing out of the thing granted, and not *in esse* before. Co. Litt. 47a; Doe d. Douglas v. Lock, 2 Adol. & E. 743 (Eng. 1835). Since an exception is in effect merely a part of the description of the thing granted, no words of inheritance are necessary in order that the grantor may retain the same estate in the thing excepted as he had before. But since a reservation creates a thing not before *in esse*, it must contain words of inheritance, in those jurisdictions where the common law rule prevails. Co. Lit. 47a, 215b; Ashcroft v. Eastern R. Co., 126 Mass. 196 (1879); Whitaker v. Brown, 46 Pa. 197 (1863). But in the United States very generally the logical and historical significance of these terms has been lost sight of, and they are used almost interchangeably, or rather the courts, without regard to the particular terms used in the conveyance, construe the language as an exception or reservation, according to the character of right intended to be created thereby. Minor on Real Property, p. 122; Tiffany on Real Property; Engel v. Ayer, 85 Me. 453 (1893); White v. N. Y. & N. E.

R. Co., 156 Mass. 181 (1892). The principal case is in accord with this rule which makes the intent of the parties, rather than the words "exception" or "reservation" the determining factor in ascertaining what estate is preserved.

INTOXICATING LIQUOR—VINOUS OR SPIRITUOUS LIQUORS—BEER—Under a statute authorizing an injunction against persons who may sell or give away any vinous or spirituous liquors unlawfully, one who sells beer, cannot be enjoined though the beer contains alcohol. Beer is neither a vinous nor a spirituous liquor. Collotta v. State, 70 So. 460 (Miss. 1916).

In deciding what liquors are included in the term "vinous liquors," the courts are united in holding that beer is not such. Tinker v. State, 90 Ala. 647 (1891); Sarlls v. United States, 152 U. S. 570 (1892). So when there is an indictment for selling vinous liquors, proof that beer was the liquor sold, is a fatal variance. Feldman v. City of Morrison, 1 Ill. App. 460 (1877). So alcohol is not a vinous liquor within the meaning of the statute. State v. Martin, 34 Ark. 340 (1880).

That beer is not embraced within the term "spirituous liquors" has been generally held. Fritz v. State, 60 Tenn. 15 (1875); *In re* McDonough, 49 Fed. 360 (1892); Gwadinger v. Com., 4 Ky. Law Rep. 514 (1883). But there is some authority *contra.* State v. Brown, 51 Conn. 1 (1883); State v. Giersh, 98 N. C. 720 (1887). Beer is within the meaning of a statute prohibiting the sale of "strong and spirituous liquors." Tompkins County v. Taylor, 21 N. Y. 173 (1880). The term "spirituous liquors" includes all liquors that are distilled as opposed to fermented, and which contain alcohol. State v. Reiley, 66 N. J. Law, 399 (1901); State v. Thompson, 20 W. Va. 674 (1890). So wine, hard cider, and ale are not spirituous liquors. State v. Moore, 5 Blackf. 118 (Ind. 1870). But wine has been so held. Jones v. Surprise, 64 N. H. 243 (1886). Alcohol itself is not a spirituous liquor. Semly v. State, 69 Miss. 628 (1892); State v. Martin, 34 Ark. 340 (1880), though this case is annulled by Winn v. State, 43 Ark. 151 (1892).

The words "intoxicating liquors," when used in a statute are generally held to include all spirituous, vinous and malt liquors. So beer is included under this term. State v. Billups, 63 Ore. 277 (1912); State v. Dick, 47 Minn. 375 (1892); State v. Heinze, 45 Mo. App. 403 (1891). In most cases the court will take judicial notice that beer is intoxicating. Houghland v. Canfield, 160 Fed. 146 (1908); State v. Mitchell, 134 Mo. App. 540 (1908). In other cases where a sale of beer is shown the court implies that it was intoxicating liquor. State v. Ramsy, 63 Or. 291 (1913). In other States beer is presumed to be intoxicating and the burden is on the defendant to show otherwise. State v. May, 52 Kan. 53 (1894); State v. Durr, 69 W. Va. 251 (1911).

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INSPECTION OF APPLIANCES—A rule of a company required workmen to examine personally all appliances used by them. A workman was seriously injured by a defect in part of the equipment customarily used for the purpose to which he was

putting it. *Held:* The rule merely required the workman to make such examination as would discover defects open to ordinary observation and not to search for hidden defects; it was the master's duty to make the appliances reasonably safe for the use of the workmen. St. Louis Ry. Co. v. Gilley, 181 S. W. 918 (Ark. 1916).

This is in accord with the general doctrine that the master is bound to use reasonable care in supplying a safe place and safe means of work. Wood, Master & Servant, § 329 ff. McCormick Co. v. Wojciechowski, 111 Ill. App. 641 (1904); Gray v. Commutator Co., 85 Minn. 463 (1902). Many courts, however, do not apply this rule to simple tools. Lynn v. Glucose Co., 128 Ia. 501 (1905); Smith v. Fuel Co., 108 N. Y. S. 45 (1908). While others take the view that a defect in a simple tool must be obvious to the servant, and the master is relieved of liability. 3 Labatt, Master & Servant, § 924*a*; Webster Co. v. Nisbet, 205 Ill. 273 (1903); Lukovski v. Mich. Cent. Ry., 164 Mich. 361 (1911). The master is generally bound to warn the servant of latent dangers. Wood, Master & Servant, § 354; Bell v. Nor. Pac. Ry., 112 Minn. 488 (1910). But if the defect is such that the servant could have avoided danger by using ordinary care, he must do so or be guilty of contributory negligence. Wood, Master & Servant, § 335 ff.; Ind. Ry. v. Bundy, 152 Ind. 590 (1899); Louisville Ry. v. Hall, 115 Ky. 567 (1903); Holmes v. Penna. Co., 13 Ohio C. C. 397 (1897). There is, however, generally held to be no duty of inspection on the servant, and he has the right to assume that the master has performed his duty. 4 Labatt, Master & Servant, § 1330 ff.; Bird v. Utica Min. Co., 2 Cal. App. 674 (1906); McCormick v. Wojciechowski, *supra;* O'Brien v. Sullivan, 195 Pa. 474 (1900).

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—WHEN IS AN EMPLOYEE ENGAGED IN INTERSTATE COMMERCE?—A track laborer was injured while loading on a flat car, old steel rails, which had been removed from the railroad track and left on the right of way beside it to be sold or stored. The railroad was an interstate carrier and the injury was the result of a foreman's negligence. *Held:* Such employee is not engaged in interstate commerce within the purview of the Federal Employers' Liability Act (Act Apr. 22, 1908, 35 U. S. Stat. at L. 65). Illinois Cent. R. Co. v. Kelly, 181 S. W. 375 (Ky. 1916).

A number of the cases previous to October, 1915, and the theories upon which these cases have been decided will be found in the annotation of Ross v. Sheldon, 154 N. W. 499 (Ia. 1915), in UNIV. OF PENNA. L. REV., Vol. 64, p. 312 (Jan. 1916). In many cases, the decision is a matter of degree dependent upon whether the work being done was so closely connected with interstate commerce as to be a part of it and directly related to it. So one of the great distinctions as to workmen has been whether they are engaged in construction work, in which case they are without the act or whether they are engaged in repair or maintenance work, in which case the contrary is true. Jackson v. Chicago, *etc.*, Rwy. Co., 210 Fed. 495 (1914); Pedersen v. Delaware, *etc.*, Rwy. Co., 229 U. S. 146 (1913); Holmberg v. Lake Shore & M. S. Rwy. Co., 155 N. W. 504 (Mich. 1915); Waina v. Pennsylvania Co., 96 Atl. 461 (Pa. 1915).

Some of the cases decided during the past six months present interesting applications of the rules. In contrast with the principal case, a workman engaged in putting a rail in the main tracks of an interstate carrier was held to be engaged in interstate commerce. Cincinnati, *etc.*, Rwy. Co. v. Tucker, 181 S. W. 940 (Ky. 1916). In the following cases, the employees were held to be within the Act:—where the workman was employed in cleaning out an ash pit into which ashes from both interstate and intrastate locomotives were dumped, Grybowski v. Erie R. R., 95 Atl. 764 (N. J. 1915); where the injured man was engaged in moving a new outhouse to a depot used for interstate traffic, there to install it in place of an old one previously erected, Nash v. Minneapolis & St. L. R. Co., 154 N. W. 957 (Minn. 1915). The following employees were held not to be engaged in interstate commerce:—A man engaged in repairing machinery in a shop in which both interstate and intrastate engines were repaired, Shanks v. Delaware, *etc.*, R. Co., 36 S. C. Rep. 188 (1915); a conductor in charge of a work train, running intrastate, which collected ties and carried them to X, from which they were taken to Y to be treated and then used in repairing tracks both within and without the State, Alexander v. Great Northern Rwy. Co., 154 Pac. 914 (Mont. 1916); a man injured while repairing an engine used to haul a work train, running intrastate, but engaged in repairing an interstate roadbed, Louisville & N. R. Co. v. Carter, 70 So. 655 (Ala. 1915).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—WHO IS A DEPENDENT?—Some years before his death, deceased had induced his sister to remain at home and take charge of the household. Aside from the board paid by another sister, he paid all the expenses of the house and furnished the claimant with whatever she needed, and gave her money at regular intervals; there was no agreement as to wages. At the time of his death she had $600 in bank, and a one-third interest in a paying property assessed at $1300. *Held:* Claimant was a "dependent," as a basis for compensation, but in view of her property, she was but "partially dependent." Kenney v. City of Boston, 111 N. E. 47 (Mass. 1916).

Nearly all the workmen's compensation acts establish classes of persons who are by virtue of their relationship to the decedent conclusively presumed to have been dependent upon him. Such are usually husbands, wives, and children within a certain age limit. In the absence of such specific determination by the act, the question of dependency is one of fact. Herrick's Case, 217 Mass. 111 (1914); New Moncton Collieries v. Keeling, 4 B. W. C. C. 332 (Eng. 1911). The test of dependency is not that the contributions of the decedent were necessary for the support of the claimant, but that the claimant relied upon the contributions for his or her means of living. Appeal of Bond Co., 93 Atl. 245 (Conn. 1915). The question as to the extent of the dependency, whole or partial, is also a question of fact. Stevenson v. Watch Case Co., 186 Ill. App. 418 (1914); Caliendo's Case, 219 Mass. 498 (1914); Tamworth Colliery Co. v. Hall, 4 B. W. C. 313 (Eng. 1911).

See Richelieu v. Union Pac. R. Co., 149 N. W. 772 (Neb. 1914), a case very similar to the principal case, arising under the Federal Employer's Liability Act, annotated in 63 UNIV. OF PENNA. L. REV., 457.

NEGLIGENCE—STREET RAILWAYS—PASSENGER RIDING ON RUNNING BOARD—A passenger on a crowded summer street car gave his seat to a lady and stood on the running sideboard of the car, where his head came in contact with a pole. *Held:* He is entitled to the same degree of diligence to protect him from dangers as the other passengers. Pildish v. Pittsburgh Rys. Co., 61 Pa. Super. 195 (1915).

The courts are in accord in holding that it is not negligence *per se* for a passenger to stand on the running board of an open car, when the seats are all occupied. Anderson v. City Ry. Co., 42 Ore. 505 (1903); Verrone v. Rhode Is. Ry., 27 R. I. 370 (1905); Horan v. Rockwell, 96 N. Y. S. 973 (1906). If the car is crowded so that he is compelled to ride on the running board with the knowledge and assent of the conductor, he is entitled to protection, Timkins v. Phila. R. T. Co., 244 Pa. 182 (1914); and can recover if injured, Hesse v. Meriden, *etc.*, Co., 75 Conn. 571 (1903). Where a passenger getting on at the front end of a crowded car is obliged to walk along the running board to find a seat, he can recover for injuries caused by the sudden start of the car. Citizens' Ry. Co. v. Meril, 26 Ind. App. 284 (1901). The question whether there was available space inside the car is for the jury. Renney v. Webster St. Ry., 50 Pa. Super. 579 (1912). The passenger will generally be regarded as having assumed the risk of dangers from riding in this position if there is room inside. Moody v. Springfield St. Ry., 182 Mass. 158 (1902); Burns v. Johnstown Ry., 213 Pa. 143 (1906). But a passenger in such a position must exercise reasonable care for his own safety in view of the danger of his exposed position, and keep a lookout for objects along the track, such as vehicles and posts. Rosen v. Dry Docks, *etc.*, Ry., 91 N. Y. S. 333 (1904); Third Ave. R. Co. v. Barton, 107 Fed. 215 (1901).

PLEADING—STATUTE OF FRAUDS—ADMISSIBLE UNDER GENERAL DENIAL—In an action of *assumpsit*, the general issue was pleaded and the plaintiff offered to show a parol promise. The defendant objected on the ground that the Statute of Frauds prevented a recovery on such an oral contract. *Held:* The Statute of Frauds was available under the general denial without a special plea. Pocket v. Almon, 96 Atl., 421 (Vt. 1916).

It is a well settled rule in most jurisdictions, that where the plaintiff bases his cause of action on a contract, which is denied by the defendant, the latter may avail himself of the Statute of Frauds without specially pleading it, as the denial of the contract requires the plaintiff first to prove a valid and enforceable contract, and if the plaintiff attempts to establish a contract which will fall within the Statute of Frauds, the defendant has the right and opportunity to insist upon the invalidity thereof. Reid v. Stevens, 120 Mass. 209 (1876); Owen v. Riddle, 81 N. J. L. 546 (1911); Third Nat. Bank v. Steel, 129 Mich. 434 (1902); May v. Sloan, 101 U. S.

231 (1880). There is some authority *contra,* that the Statute of Frauds must be specially pleaded, but these cases all recognize the fact that the common law and the weight of modern authority is the other way. Jones v. Field, 83 Ala. 445 (1887); Suber v. Richards, 61 S. C. 393 (1901); City v. Mfg. Co., 93 Tenn. 276 (1893). Objection to proof of the oral contract, in addition to a general denial is required in some cases. Henry v. Hilliard, 155 N. C. 372 (1911); Sammers v. McGeehan, 43 Mo. App. 664 (1891); Harvester Co. v. Campbell, 43 Tex. Civ. App. 421 (1906). In New York there has been a diversity of decisions, the rule as laid down by the late cases now appearing to be that a denial of the contract, will not be sufficient to invoke the Statute. Hardt v. Recknagel, 62 App. Div. 106, N. Y. (1901).

The conflict in American cases on the subject is due to the adoption of the old English chancery rule by some of the courts. This rule grew out of and is based on the assumption that a parol contract within the Statute had some kind of validity. So chancery required that the Statute be specially pleaded. Feeny v. Howard, 4 L. R. A. 830 (Cal. 1889).

SALES—IMPLIED WARRANTY OF FITNESS—SODA FOUNTAIN—In a sale and installation of a soda fountain it was found that the vendor, also the manufacturer, undertook to supply an article adapted to a particular purpose, but that the contract did not contemplate a definite and known article of sale on the market. It was entirely unfit. *Held:* The vendee could recover on the breach of an implied warranty that the article would be fit for the purpose made known to the vendor. Western Cabinet Co. v. Davis, 181 S. W. 273 (Ark. 1916).

The rule is well settled that where an article is supplied for a particular purpose, the vendor being expressly informed of that purpose and the vendee relies on the vendor's selection, there is an implied warranty that the article furnished shall be reasonably fit and suitable for that purpose. Kellogg Bridge Co. v. Hamilton, 110 U. S. 108 (1884); Morse v. Union Stock Yards, 21 Oregon 289 (1891). There is no doubt attaching to the rule where the seller is also the manufacturer. But the American courts are not in accord where the vendor is only a dealer. The majority raise no implied warranty in such a circumstance, holding the purchaser as fully competent to judge as a dealer. White v. Oakes, 88 Me. 367 (1896); Seller v. Stevenson, 163 Pa. 529 (1894). A few states, however, hold the dealer to an equal responsibility with the manufacturer. Dushane v. Benedict, 120 U. S. 630 (1886). It has been held that the dealer can undertake to supply for a particular use the same as a manufacturer and that this undertaking is the true ground for responsibility. McCaa v. Elam Drug Co., 21 So. 479 (Ala. 1897). The English rule is clear in adhering to the classification of Mellor, J., in Jones v. Just, L. R., 3 Q. B. 197 (Eng. 1868), which expressly includes a dealer as well as a manufacturer. It has been held to extend as well to a vendor who is the grower of the article sold. White v. Miller, 71 N. Y. 118 (1877).

But it is equally as well settled that where the vendee purchases a specific, described, or definite article, there is no implied warranty even

though the vendor knows the purpose or work which the purchaser intends to accomplish with it. Seitz v. Brewers' Refrigerating Co., 141 U. S. 510 (1891); Davis Calyn Drill Co. v. Mallory, 137 Fed. 332 (1904), (but see the dissenting opinion based more on the application of the law to the facts than on the law itself); Port Carbon Iron Co. v. Groves, 68 Pa. 149 (1871); Jarecki Mfg. Co. v. Kerr, 165 Pa. St. 529 (1895). If, under such circumstances the vendor assures the vendee it will effect the work such assurance has been held mere opinion. Davis Co. v. Mallory, *supra*. This latter case is held directly in point by the court in the principal case.

SLANDER—REFUSAL OF COMMUNION TO CHURCH MEMBER—A minister did not administer communion to a church member but passed by her, as she stood at the table, without comment. *Held:* This did not constitute actionable defamation of character. Carter v. Papineau, 111 N. E. 358 (Mass. 1916).

The false publication which is essential to the action of defamation has always been limited to a publication of words or pictures, and mere acts cannot come within the accepted definition. James Co. v. Bank, 105 Tenn. 1 (1900); Odgers, Libel & Slander (4th Ed.), 13; Burdick, Torts (2nd Ed.), 292. However, in Schultz v. Frankfort Marine Ins. Co., 151 Wis. 537 (1913), where the plaintiff was subjected to ridicule and loss of employment by reason of his being openly and publicly "shadowed" by the defendant's detectives, such acts of continued and notorious surveillance were held to take the place of spoken words and recovery was granted. In the principal case there was no continuous act, and although the plaintiff undoubtedly suffered mental distress by reason of the omission in the presence of the other communicants, she was not publicly declared to be "an open and notorious evil liver." In addition, the act of "passing her by" without comment was within the discipline of the church, and there was clearly no ground for actionable defamation of character.

SUNDAY LAWS—AMUSEMENTS—VIOLATION OF STATUTE—Under a statute which prohibits amusements on Sunday for which an admission fee is charged, a moving picture show was given at which no admission was charged, but contributions were solicited for the benefit of a charity after the actual running expenses of the show were deducted. *Held:* This was a violation of the statute. Spooner v. State, 182 S. W. 1121 (Texas 1916).

There is such a difference in the language of the Sunday laws in the various jurisdictions that there is little uniformity in the decisions as to the legality of any particular Sunday amusement or exhibition. In some jurisdictions a moving picture show does not come within the inhibition of such a statute. State v. Chamberlain, 112 Minn. 52 (1910); Clinton v. Wilson, 101 N. E. 192 (Ill. 1913). In others it does. Rosenburg v. Arrowsmith, 89 Atl. 524 (N. J. 1913); *ex parte* Zuccaro, 162 S. W. 844 (Tex. 1914). Such statutes make the exception where the entertainment is given by a religious or charitable society for their exclusive benefit, and in such a case only the net receipts need be devoted to the charity. Commonwealth v. Alexander, 70 N. E. 1017 (Mass. 1904). But theatrical and other per-

formances on Sunday are generally expressly prohibited by statute. Quarles v. State, 17 S. W. 269 (Ark. 1886), 14 L. R. A. 192; Matter of Hammerstein, 108 N. Y. Supp. 197 (1908). But dancing on Sunday, not as an exhibition or performance, but merely for the amusement of the dancers, does not constitute a violation of such a statute. Matter of Allen, 70 N. Y. Supp. 1017 (1901). Playing baseball on Sunday comes within the inhibition of such statutes in some jurisdictions. Seay v. Shrader, 95 N. W. 690 (Neb. 1903); People v. Poole, 89 N. Y. Supp. 773 (1904). But not when played on private grounds. People v. Dennin, 35 Hun. 327 (N. Y. 1885). However, fishing on Sunday, even on private grounds, is unlawful. People v. Moses, 20 N. Y. Supp. 9 (1893). Also the use of a Sunday excursion boat for hire has been held unlawful. Commonwealth v. Rees, 10 Pa. Co. Ct. 545 (1891). Such statutes are not unconstitutional as interfering with religious freedom when applied to Jews, who celebrate the sabbath day on Saturday. State v. Weiss, 97 Minn. 125 (1906).

SURETYSHIP—COLLATERAL SECURITY—SUBROGATION—The plaintiff was a surety upon a note given to the defendant, which note was also secured by a second mortgage upon the debtor's property. The defendant afterwards misapplied payments made by the debtor. *Held:* The surety is relieved from liability to the extent that he has been prejudiced. Patch v. First National Bank, 96 Atl. 423 (Vt. 1916).

A surety who has been obliged to pay the debt of another is entitled to resort to all the securities and remedies possessed by the creditor in order to secure repayment from the debtor. Houston v. Branch Bank, 25 Ala. 250 (1854); People v. Salamon, 184 Ill. 490, 513 (1900); Leavitt v. Pacific Railway, 90 Me. 153 (1897). If the creditor intentionally surrenders or impairs the security, or negligently loses or parts with the same, his claim against the surety is reduced *pro tanto*. Nelson v. Munch, 28 Minn. 314 (1881); Plankington v. Gorman, 93 Wis. 560 (1896). However, a stranger, under no obligation to pay and having no interest of his own to protect and paying without any request by the debtor, is not entitled to be subrogated to the right of the creditor. Cumberland Loan Assn. v. Sparks, 106 Fed. 101 (1900); Kocher v. Kocher, 56 N. J. Eq. 547 (1898). Nor is a party entitled to subrogation who has been guilty of fraudulent conduct. Lowry Banking Co. v. Lumber Co., 91 Ga. 624 (1893); Greig v. Rice, 44 S. E. 729 (S. C. 1903). *Laches* in asserting this right of subrogation will forfeit it as against anyone who is injured by such delay. Mercantile Co. v. K. and O. Railway, 58 Fed. 6 (1893); Grings Appeal, 89 Pa. 336 (1879). Likewise, under no circumstances will a paying surety be given this remedy if it would prejudice the rights of the creditor or innocent third parties. Richards v. Griffith, 92 Cal. 493 (1891); Orvis v. Newell, 17 Conn. 97 (1845). Nor is the surety entitled to subrogation until the whole of the claim has been paid. Magee v. Leggett, 48 Miss. 139 (1873); Gannett v. Blodgett, 39 N. H. 150 (1859).

In the absence of special circumstances the surety has no right to insist that the creditor resort to security given by the principal debtor

before demanding payment of the surety. Davis v. Patrick, 57 Fed. 909 (1893); Allen v. Woodward, 125 Mass. 400 (1878); Bingham v. Mears, 4 N. Dak. 437 (1894). In the principal case the court treats the surety's right against the creditor as one of exoneration, whereas, strictly speaking, exoneration is the right of a surety to force the principal debtor to make payment after maturity of the debt, even though no demand has been made on the surety. Holcomb v. Fetter, 70 N. J. Eq. 300 (1905); Norton v. Reid, 11 S. C. 593 (1867).

TAXATION—"INHABITANT"—ARMY OFFICER—A New Hampshire statute (Laws, N. H. 1913, c. 82, § 1), provides that every male *inhabitant* of the state shall be taxed a certain amount. A officer in the coast artillery branch of the United States Army, whose domicile of origin was in New York, where he returned at the expiration of each term of enlistment, was stationed at a fort located in New Hampshire. After his marriage to a New Hampshire woman, he maintained an apartment in the city of Portsmouth, because of the lack of facilities at the fort, and by special permission spent several nights a week in the city. *Held:* The word "inhabitant" means one domiciled in the state. The officer was not domiciled at Portsmouth, because the "element of more or less permanency" was lacking, since his military duties were likely to call him away at any time. *Ex parte* White, 228 Fed. 88 (1916).

While the distinction between "residence" and "domicile" is clearly defined, Long v. Ryan, 30 Gratt. 718 (Va. 1878); Minor: Conflict of Laws, Ed. 1901, § 20, there is considerable difference of opinion as to the exact meaning of "inhabitancy." In a statute dealing with the administration of decedent's estates, inhabitancy was held to connote something different from domicile. Holmes v. Oregon & C. A. Co., 5 Fed. 523 (1881). So also in a divorce statute. Wallace v. Wallace, 62 N. J. Eq. 509 (1901). On the other hand, a number of cases regard inhabitancy and domicile as synonymous. Borland v. City of Boston, 132 Mass. 89 (1882); Stockton v. Staples, 66 Me. 197 (1877); Woodward v. Isham, 43 Vt. 123 (1870); Culbertson v. Board of Commissioners of Floyd County, 52 Ind. 361 (1876).

Aside from this question of construction, which is purely one of municipal law, there is involved in the principal case the problem of private international law relating to the circumstances under which a domicile of choice may be acquired. Two different tests have been prescribed. One requires actual residence at a particular place accompanied by an intention of continuing there indefinitely. Bell v. Kennedy, L. R. 1 H. Lds. 307 (Scot. 1868). The other requires actual residence at a place without any present intention of removing therefrom. Putnam v. Johnson, 10 Mass. 488 (1813). The court in the principal case applied the former test, holding that the army officer had no intention of remaining indefinitely in New Hampshire, because his military calling might necessitate his immediate departure at any time, and that he had therefore not acquired a domicile in that state. Cf. Attorney-General v. Pottinger, 6 H. & N. 733 (Eng. 1861); State v. Judge, 13 Ala. 805 (1848); Brewer v. Linnaeus, 36 Me. 428 (1853).

TORTS—DAMAGES—MENTAL SUFFERING—Mental suffering from shame and humiliation, experienced by a woman who was assaulted in the presence of her neighbors, is general damage and may be recovered in an action for the assault without special allegation. Rogers v. Bigelow, 96 Atl. 417 (Vt. 1916).

It is generally held that in actions for intentional wrongs damages are recoverable for mental suffering consisting in a sense of wrong, or insult, indignity, humiliation or injury to the feelings. Rwy. Co. v. Williams, 55 Ill. 185 (1870); Kline v. Kline, 158 Ind. 602 (1902); Leavitt v. Dow, 105 Me. 50 (1910); and this rule is particularly applicable where such suffering is the result of intentional trespass upon the person of a woman. Lonergan v. Small, 81 Kan. 48 (1910); Kurpgewist v. Kirby, 88 Neb. 72 (1910). The mental suffering must be real and not merely sentimental. Jenson v. Rwy. Co., 86 Wis. 589 (1894). In some states such damages are awarded because an intention to hurt the feelings will be inferred Spade v. Rwy. Co., 168 Mass. 285 (1897). The material damage may be trivial, Kimball v. Holms, 60 N. H. 163 (1880); but many states hold that damages cannot be recovered for mere mental distress when not accompanied by *some* physical injury. Ewing v. Rwy., 147 Pa. 40 (1892); Wilcox v. Rwy., 52 Fed. 264 (1892); Pankopf v. Hinkly, 141 Wis. 146 (1910). But many jurisdictions have repudiated this rule and hold that damages are recoverable for mental suffering caused by a wrongful, intentional act, even though there be no physical injury. Carmichael v. Telan Co., 157 N. C. 21 (1913); Cowen v. Tel. Co., 122 Ia. 379 (1904); Larson v. Chase, 47 Minn. 307 (1891). Davis v. Rwy. Co., 35 Wash. 203 (1904). Damages awarded because of insult, indignity and the like are sometimes called "*solatium*" to distinguish them from compensatory damages. Saunders v. Gilbert, 156 N. C. 463 (1911). In other states damages for humiliation are regarded as exemplary. Bank v. Morey, 113 Ky. 857 (1902); Borland v. Barrett, 76 Va. 128 (1882). But it is the general rule that humiliation is an element of general rather than special damage, and so need not be specially alleged. Fink v. Busch, 83 Neb. 599 (1908); Knoche v. Knoche, 160 Mo. App. 257 (1911); Rwy. v. Dickey, 31 Ky. Law. Rep. 894 (1908).

TORTS—MASTER AND SERVANT—"VICE PRINCIPAL"—An employee engaged in the work of razing a house was fatally injured through the negligence of the foreman in charge of the work. *Held:* The master was not liable as the foreman did not have the power to hire or discharge his subordinates, which is necessary to constitute one a vice principal. Reid v. Medley's Adm'r, 87 S. E. 616 (Va. 1916).

Several of the American courts have adopted the doctrine that all superior servants are vice principals as regards their subordinates. Wilson v. Counsell, 182 Ill. App. 79 (1914); Hunn v. Michigan Cent. R. Co., 44 N. W. 502 (Mich. 1889). This idea has produced endless confusion in the decisions, and it is difficult to ascertain the rationale of the doctrine. It is because of the obligation of a servant to obey his superior according to some courts. Turner v. Goldsboro Lumber Co., 119 N. C. 387 (1896).

Others say because the duty to use care in giving orders is one of the non-assignable duties of the master. Miller v. Missouri Pac. R. Co., 19 S. W. 58 (Mo. 1891). This doctrine has been unequivocally repudiated by the great majority of the American courts. Meehan v. Speirs Mfg. Co., 52 N. E. 518 (Mass. 1899); Kiffin v. Wendt, 57 N. Y. Supp. 109 (1899); Durst v. Carnegie Steel Co., 173 Pa. 162 (1896). However, in some states departmental managers and superintendents are held to be vice principals. Prevost v. Citizens' Ice & Refrigerating Co., 185 Pa. 617 (1898); Alaska Treadwell Gold Mining Co. v. Whelan, 168 U. S. 86 (1897). But a mere foreman of subordinate grade is not converted into a vice principal by the fact that, among his powers, is included that of hiring and discharging. Alaska Treadwell Gold Mining Co. v. Whelan, *supra;* Gilmore v. Oxford Iron & Nail Co., 25 Atl. 707 (N. J. 1892); thus *contra* to the principal case. However, it is universally agreed that the general rules of the law of agency are controlling in all cases to this extent,—that if the act was within the scope of such employee's authority, the master cannot escape liability on the ground that it was done in direct violation of his orders. Atchison, T. & S. F. R. Co. v. Randall, 19 Pac. 783 (Kan. 1888).

It is well to note that the liability of the employer in any of these cases is no longer a matter of doubt in those states which have passed workmen's compensation acts.

TRUSTS—SPENDTHRIFT TRUSTS—ATTACHMENT FOR SUPPORT OF CHILD OF *Cestui que Trust*—The Commonwealth attached a spendthrift trust fund, held for a beneficiary who failed to support his child, as directed by the court. *Held:* The attachment was permissible under the Act of April 15, 1913, P. L. 72. Com. v. Cozens, 25 Dist. R. 177 (Pa. 1916).

It is a general rule that the same incidents attach to an equitable interest as to a legal title, and in strict theory no trust can be created with the proviso that the interest of the *cestui que trust* shall not be charged with his debts. Such is the law in England and a few American jurisdictions. Jones v. Reese, 65 Ala. 134 (1880); Adair v. Adair, 30 Ky. Law Rep. 857 (1907). But this so-called English doctrine concedes that the donor may pass an estate which will terminate upon the bankruptcy of the beneficiary or upon due attempt of the latter to alienate. Heath v. Bishop, 4 Rich. Eq. 46 (S. C. 1851). And a trust may be created which vests no interest in the beneficiary, as where the trustees may apply the fund at their discretion. Davidson v. Kemper, 79 Ky. 5 (1880). Moreover, the trust fund cannot be attached when the interest of the debtor is not separable from the interests of the other beneficiaries. Hackett v. Hackett, 146 Ky. 408 (1912). In most jurisdictions the American doctrine has been adopted, and spendthrift trusts are held valid, free from the attachment of creditors of the *cestui que trust.* Nichols v. Eaton, 91 U. S. 716 (1875); White v. Williams, 172 Ill. App. 630 (1913); Holbrook's Estate, 213 Pa. 93 (1905). While the spendthrift trust usually creates a life interest, it may be for a shorter period. Siegwarth's Estate, 226 Pa. 591 (1910). And the beneficiary may devise his interest. Fleming's Estate, 219 Pa. 422 (1908). A spendthrift trust is not created if the beneficiary is given any control over the

estate. Croom v. Ocala Co., 57 So. 243 (Fla. 1911); Morgan's Estate, 223 Pa. 228 (1909). And a settlor can never create such a trust for his own benefit in order to defeat his creditors. Ullman v. Cameron, 186 N. Y. 339 (1906); Nolan v. Nolan, 218 Pa. 135 (1907). In Michigan the surplus over what is needed for the maintenance of the spendthrift is liable for the *cestuis* debts. Spring v. Randall, 107 Mich. 103 (1895). In New York only a small percentage of the trust fund is exempted by statute. Brearley School v. Ward, 201 N. Y. 358 (1911).

In Pennsylvania, prior to the Act of 1913, the spendthrift trust fund was not attachable by any creditor of the *cestui que trust*, even to enforce the payment of alimony. Thackara v. Mintzer, 100 Pa. 151 (1882); or for the support of the beneficiary's wife and children. Phila. v. Lockard, 198 Pa. 572 (1901). This has been changed by the statute, which, while retroactive, is declared constitutional in the principal case.